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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1948

No. 419
No. 420

J. P. BEELER, *PETITIONER,*

VS.

THE CHICAGO, ROCK ISLAND AND PACIFIC RAILWAY COMPANY, DOING BUSINESS BY AND THROUGH JOSEPH B. FLEMING AND AARON COLNON AS TRUSTEES, *RESPONDENTS.*

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Respondents, Joseph B. Fleming and Aaron Colnon, were the duly appointed, qualified and acting trustees of the estate of The Chicago, Rock Island and Pacific Railway Company, and answered as such in two separate actions brought by J. P. Beeler in the District Court of the United States for the District of Kansas, Second Division, at Wichita. The suits in that court were numbered 3151 and 3170, and on appeal to the Circuit Court of Appeals they were numbered 3585 and 3586, and are here numbered 419 and 420 respectively. The first of the suits was brought for the recovery of overtime claimed by plaintiff, petitioner here,

and for use of his automobile in the performance of his duties as Agent-Yardmaster for his employers at Wichita covering a period from January 1, 1938 to June 14, 1946 (R. 1-11). The second action was brought by plaintiff, "for loss of salary from June 14, 1946 for a period of 11.10 years (his life expectancy) and costs of the action." (R. 97-107.) The cases were consolidated for trial and were tried before Honorable Bower Broaddus, Assigned United States District Judge, without a jury and judgments were rendered in each case in favor of the defendants. Appeals were taken to the United States Circuit Court of Appeals for the Tenth Circuit and were affirmed—169 F. 2d 557.

CORRECTIONS SUGGESTED

Before going further we wish to call attention to a serious error in the Petition for Writ of Certiorari and Brief, which appears at the bottom of page 49 thereof. Petitioner states, "The District Court found that plaintiff, Beeler, *would be allowed an expense account for use of his automobile, Para.* 9, *R.* 16, and rendered judgment, R. 17, contrary to that finding."

On July 14, 1947, at Oklahoma City, Oklahoma, the Honorable Bower Broaddus, who tried the foregoing cases at Wichita, addressed a letter to Mr. Fred J. Partridge, Deputy Clerk of the United States District Court at Wichita, in *re Beeler v. Chicago, Rock Island and Pacific Railway Company,* Nos. 3151 and 3170, in the Kansas District, enclosing Findings of Fact and Conclusions of Law, and copies of the letter and of the findings and conclusions were sent to Mr. Claude E. Sowers, Wichita, plaintiff's attorney there and here. Paragraph 9 is quoted:

> "Plaintiff knew in December, 1937, that the duties of Yardmaster would be assigned to the Agent with the title of Agent-Yardmaster, and that plaintiff would be required to perform such duties and that he would *not* be allowed an exepnse account for use of his automobile; that he would be placed on a twelve hour schedule, as evidenced by plaintiff's letter to Mr. Mielke." (Emphasis added.)

Thereafter, Mr. Sowers gave notice of appeal to the Circuit Court of Appeals, which notice was dated August 13th and filed in the District Court at Wichita August 14th, and at the same time filed "Statement of Points on which the Appellant Intends to Rely on Appeal," and in paragraph 8 thereof he stated:

> "The United States District Court erred in finding that the plaintiff knew in December, 1937, that the duties of Yardmaster would be assigned to the Agent with the title of Agent-Yardmaster, and that plaintiff would be required to perform such duties and that he would *not* be allowed an expense account for use of his automobile; that he would be placed on a twelve hour schedule, as evidenced by plaintiff's letter to Mr. Mielke." (R. 21.)

The findings were filed in the office of the Clerk of the United States Court at Wichita and became a part of the record transmitted by the clerk to the United States Circuit Court of Appeals at Denver (R. 14-17), and the record was printed in usual course. In the printing, through error of the printer, the word "not" was omitted. Counsel for petitioner was obviously aware of the correct and express declaration of the trial court that Mr. Beeler would *not* be allowed an expense account for use of his automobile. The mistake of the printer affords no justification for its use as ground for the granting of the writ of certiorari by this court.

Another error of petitioner appears at page 46 of the petition for writ. The quotation under the title "Reasons," purporting to quote from the opinion of the Circuit Court of Appeals, is not a correct quotation. The opinion of the Circuit Court of Appeals is reported in 169 Fed. 2d, p. 557, a copy of which is attached to the record. The statement of the court, second column p. 559, is this:

> "Conversely, apart from his automobile expense, he has no right of action outside the contract. (*His employment is terminable at will*), and his discharge without a hearing was not an actionable wrong. *Littell v. Evening Star Newspaper Co.*, 73 App. D. C. 409, 120 F. 2d 36; Annotation 161 A.L.R. 709; Restatement on Agency, Sec. 442; 35 Amer. Juris., p. 456-8." (Omission is within brackets and emphasized.)

The omission by petitioner of the sentence "His employment is terminable at will," changes the sense and purpose of that part of the opinion of the court.

BRIEF

Case 419—Raises Only a Question of Contractural Obligations Under Local Law. The Decision is not in Conflict With the Decision of Any Other Circuit or Any Decision of This Court. The Station Agency at Wichita Does not Come Within the Terms of Any Labor Agreement.

The relationship which existed between petitioner and respondents, and the relationship between the Switchmen's Union of North America, the Railroad Yardmasters, and the Rock Island Association of Yardmasters, is set forth clearly in the testimony of G. E. Mallory (R. 55-72). These organizations speak for their members through their representatives duly elected or appointed, pursuant to the terms of the Railway Labor Act, and all negotiations and agreements are

carried on and formulated through such representatives. *Steele v. Louisville & Nashville R. Co. et al,* 323 U. S. 192; 65 S. Ct. 226. Petitioner's relationship affecting his transfer from Caldwell to the Cline Yard at Wichita as Yardmaster at that point were all handled through the Yardmaster's representative, in accordance with the provisions and requirements of the Act.

On January 16, 1939 (R. 92) J. P. Beeler addressed W. F. Mielke, the duly elected general chairman of the Yardmasters' organization at Rock Island, Illinois, requesting that the Yardmasters' seniority list posted at the superintendent's office at El Reno, Oklahoma, be changed to show his seniority as Yardmaster at Wichita instead of Caldwell. After conference between Mr. Mielke and F. H. Frye, Supervisor of Wage Agreements for employer, it was agreed between them that the transfer might be and was made.

It was further agreed:

> "As per our agreement, the position of Agent-Yardmaster at Wichita will be considered an official position not covered by any working agreement, but should a Yardmaster's position be re-created at Wichita, Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point." (R. 94-95.)

Thus Mr. Beeler's request was satisfied. The position of Yardmaster has not been re-created and there was no Yardmaster's position in existence at Wichita after January 1, 1938 to the time of trial of these cases June 23-24, 1947.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact by the court and the conclusions of law are printed (R. 14-17). In Par. 3 the court found that:

"... Plaintiff's position as agent, supervising switching and performing the duties as yardmaster at that point, was recognized by the Railway and the Yardmasters' organization as an official position not within the terms of any agreement with that labor organization."

The Court in Finding of Fact No. 4 stated:

"The court further finds that the defendant was not required to maintain the position of Yardmaster at Wichita if it deemed it expedient and in its interest to place the switching operations under the supervision of the Agent; that in so doing and in the absence of any contract or agreement prohibiting or restricting such arrangement, it would incur no obligation or liability to the plaintiff."

The entire Findings of Fact by the trial court are pertinent. In paragraph 2 of the findings the court declares the fact that the plaintiff, Beeler, in 1938 assumed the duties of Agent and was known as Agent-Yardmaster; that he was paid an agreed salary during this time "and received raises in wages from time to time." And it further found that there is nothing in any contract, collective bargaining contracts, affecting the relationship until the contract of 1944, "which contract clearly shows it was not contemplated that it covered the relationship of Agent-Yardmaster." The court concluded as a matter of law:

"The court concludes and declares the law to be that under the facts here found in respect to the foregoing actions, plaintiff has not established the right to recover from the defendants and has failed to establish a claim in either action upon which recovery may be had against the defendants.

"Judgment will be for the defendants as of the date of the filing of these findings of fact and conclusions of law, this the 23rd day of June, 1947." (R. 17.)

In no event does a claim for use of an automobile or for overtime become the basis of an action at law unless there is some agreement, express or implied, therefor. In the present case there was no express or implied agreement for either overtime or use of automobile. Beeler knew when he accepted his new employment that it involved a twelve hour tour of duty if necessary to perform the work. This is evidenced by a letter which he addressed to W. F. Mielke at Rock Island, Illinois, then General Chairman for the Association of Yardmasters (R. 92-93). As a part of that letter Mr. Beeler stated:

> "I was assigned the Agent's duties in addition to the Yardmaster's duties, with the title of 'Agent-Yardmaster,' and have been handling both positions since, working twelve hours per day, applying equal time to each position."

Beeler's complaint, beginning at page 1 of the record, at page 9 states:

> "That said plaintiff herein relied on said Hours of Service Act—Adamson Act, and said written agreement between the Brotherhood and said defendants' railway at all times set forth herein."

Sections 65 and 66, 45 USCA, comprise the Adamson Act. The application of that act was construed by the Circuit Court of Appeals for the Seventh Circuit in *Plummer v. Penn. R. Co.*, 37 F. 2d 874. This decision seems to settle the claim for overtime and for use of automobile against the claim of petitioner. In this case the court at page 875 declared:

> "In its decision sustaining the constitutionality of the Adamson Law, the Supreme Court held that the first section permanently established an eight-hour day in the specified employments, but that it did not undertake

to limit the hours of service or to fix wages therefor. *Wilson v. New*, 243 U. S. 332, 37 S. Ct. 298, 61 L. Ed. 755, L. R. A. 1917 E., 938, Ann. Cas. 1918A, 1024. Section 2 of the act did undertake the regulation of wages in those employments for a limited period, which expired long before appellant's employment began.

"It thus remained within the right of employers and employes to agree between themselves upon the hours to be served, and the wages to be paid therefor. The authorities supporting this proposition, under statutes similar in principle, are too definite and numerous to admit of controversy thereon." (Citing cases.)

Petitioner's complaint states that he served four hours daily as overtime for a long period, beginning January 1, 1938, and continuing to June, 1946, and that he used his automobile in the performance of his duties. The decision of the Circuit Court of Appeals in the Plummer case, page 875, second column, we believe disposes adversely his claim for overtime and use of his automobile. The Court said:

"The fundamental requisite of a contract is a meeting of minds of the parties to be bound by it. The evidence of such meeting of minds may be afforded by writings, by words spoken, or by a course of conduct. The acts of the parties may be such as to establish, quite as conclusively as the most formal and solemn instrument of writing, that there was such a meeting of minds between the parties.

"If these parties had agreed in writing that the service should be twelve hours daily, and the pay therefor $180 a month, or should be at the rate of $120 a month for an eight-hour day, and $180 a month for a twelve-hour day, it could not more definitely appear that such was the contract, than does appear from the fact that appellant, for more than six years, worked twelve hours daily for this employer and received therefor $180 for each month worked. From this long uniform practice there is no room for any other conclusion than that

the minds of the parties met on an undertaking by appellant to serve twelve hours daily, and appellee to pay in full for such twelve hours of daily service $180 each month.

"In each of the cases last above cited there was present the element of long-continued service, at a specified wage, for longer hours than the statutory time fixed for a day's service; and in each of them the court declared there could be no recovery for the overtime. The District Court properly sustained the demurrer to the declaration, and its judgment is affirmed."

In Sheets v. Eales, 135 Kan. 627, 11 Pac. 2d 1020, which action was brought for additional compensation beyond that stated in a written contract of employment, the court said in concluding its opinion: (Page 631)

"In 25 A. L. R. 218 there is an extended note treating of a servant's right to compensation for extra work or overtime, and a rule was stated based on a vast number of authorities, as follows:

'It is generally held that there is a presumption of law that all services rendered by an employee during the period for which he is employed, of a nature similar to those required of him in the course of his regular duties, are paid for by his salary, and to overcome this presumption he must show an express agreement for extra compensation.'

"See also *Houghton v. Kittleman,* 7 Kan. App. 207; *Robinette v. Coal Mining Co.,* 88 W. Va. 514.

"In our view the evidence of plaintiff failed to establish a right of recovery and the judgment sustaining the demurrer to his evidence is affirmed."

Another Kansas case is that of *Hurt v. Edgell, etc.,* 147 Kan. 234, 75 Pac. 2d 834. In its opinion the court referred to *Sheets v. Eales, supra.* After reviewing the facts at length, which included a claim of plaintiff Hurt for overtime and

extra pay which he claimed were for services outside the terms of the written contract, the court referred to the judgment of the trial court as follows: (Page 237)

> "In holding that the plaintiff was not entitled to recover, the court cited *Guthrie v. Merrill,* 4 Kan. 187, and *Weaver v. Skinner,* 103 Kan. 97, 172 Pac. 1024. In the former case the syllabus reads:
>
> > 'Where plaintiff agreed to work for a stipulated price per month, the contract being silent as to extra services, * * * in the absence of other proof, all extra work done on Sundays will be deemed to have been performed under the contract.'
>
> "In *Kelsey v. Puckett,* 198 Ia. 839, 200 N. W. 421, it was stated that 'There is a presumption in law that all services rendered by an employee during the period for which he is employed, of a nature similar to those required in the course of his regular duties, are compensated under the stipulated agreement.' (P. 842.)
>
> "In *Brooks v. L. N. R. Co.,* 218 Ky. 279, 291 S. W. 371, it was held that when the plaintiff was employed as a laborer and for a period of three years had received, without objection, wages as a laborer, he could not recover the difference between the wages of the laborer and those of an outside hostler's helper because on certain occasions he had assisted in such outside work.
>
> "In *Thibault v. National Tea Co.,* 198 Minn. 246, 269 N. W. 466, 107 A. L. R. 702, it was said:
>
> > 'In this instance plaintiff was employed in a certain capacity, not by the hour or by the day, but by the week, on a weekly salary or wage. He was paid the sum agreed upon at the end of each week and receipted in full for a week's work. It is not reasonable to construe this statute so as to give a workman a cause of action for overtime when his agreed compensation for the full period has been

> received. Every moment of his work was spent under the single contract of employment for a stipulated price for the whole week. Under similar facts, recovery for overtime by virtue of statutes fixing the duration of a standard working day has been denied.'" (Here among other cases the court cited *United States v. Martin*, 94 U. S. 400, and *Plummer v. Pennsylvania R. Co.*, 37 Fed. 2d 874 (p. 248).)

When appellant left the conference with C. J. Brown, General Manager of the Railway, on December 24, 1937 (R. 6 Par. 9), he knew there would be no assistant in the yard and that there would be no pay for overtime or for the use of his automobile. His pay as Agent-Yardmaster was increased at various times, beginning January 1, 1938, until his dismissal June 17, 1946.

United States v. Martin, 94 U. S. 400, arose under an act of Congress (15 Stat. 77), declaring that eight hours shall constitute a day's work for certain employees of the government. Martin claimed that under the act of Congress eight hours constituted a day's work for all laborers employed under what was designated as the "Eight Hour Law." Martin was required to work twelve hours a day and he made claim for overtime of four hours daily. The court below dismissed the petition but subsequently made an order vacating the judgment and directing:

> "For the purpose of an appeal, a *pro forma* judgment to be entered in favor of the claimant in the sum of $1019.40. The United States thereupon appealed."

The Supreme Court determined the case on appeal and entered this order:

> "Judgment reversed, and cause remanded with directions to dismiss the petition."

In the course of the opinion the court said:

> "In the case before us, the claimant continued his work, after understanding that eight hours would not be accepted as a day's labor, but that he must work twelve hours, as he had done before. He received his pay of $2.50 a day for the work of twelve hours a day, as a calendar day's work during the period in question, without protest or objection. At that time ordinary laborers under the same government received but $1.75 per day at the same place, and those engaged in the same department with the claimant in a private establishment, at the same place, received but $2 for a day's work of twelve hours, and the finding adds, 'they had more work to do than the claimant had while similarly employed.' The claimant's contract was a voluntary and a reasonable one, by which he must now be bound."

Attention is directed to *Coke v. Illinois Central R. Co.*, 255 Fed. 190. There the court held that the Adamson Law does not apply to all employees of railroads engaged in interstate commerce but applies only to the four brotherhoods which were on the verge of a nationwide strike. The court said:

> "The Supreme Court sustained the classification on the ground that only those actually engaged in the operation of trains (not including switchmen) were threatening to strike, and that it was, therefore, proper to pass legislation which affected only those who were so threatening; apparently meaning thereby to say that the legislation applied only to the Order of Railway Conductors, Brotherhood of Locomotive Engineers, Brotherhood of Locomotive Firemen and Engineers, and Brotherhood of Railway Trainmen."

Then quoting from the decision of the Supreme Court in *Wilson v. New*, 243 U. S. 332, the Federal Court continued:

> "Clearly the Adamson Law does not apply to all em-

ployees of railroads engaged in interstate commerce, nor does it apply to all those who are actually engaged in doing some of the things necessary for the operation of trains."

Petitioner's complaint below and the evidence introduced at the trial refer to and recognize an agreement between the Railway Company and the Rock Island Yardmasters' Association dated July 30, 1935 (R. 74) and the agreement between the Railway Company and the Railroad Yardmasters of America, Rock Island Division No. 26, dated January 1, 1938 (R. 81), and agreement between the Trustees of the Railway Company and Railroad Yardmasters of America, dated May 20, 1944 (R. 76), all introduced by petitioner in support of his complaints. He now seeks to repudiate these agreements, entirely disregarding (c) of *Ex Parte* No. 72 (Sub. No. 1), 264 ICC 239-246, copied as a footnote to the opinion of the court below, 169 F. 2d 557 at p. 561. For convenience the ICC designation above referred to is reproduced:

"(c) GREATER RESPONSIBILITIES. Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than agents hereinbefore classed as subordinate officials, may be designated officials and excluded from the class of subordinate officials."

After January 1, 1938, Mr. Beeler's duties were wholly supervisory. He had an office force to look after the details of the freight office (R. 41) and an engine crew, one of whose number was a foreman, handled the work in the switch yard, so that Mr. Beeler's duties were wholly supervisory. The Circuit Court stated in its opinion (R. 121):

"Here, for eight years, appellant performed the duties of a station agent at a large and important station. He

occupied the office of the station agent, and supervised all the business of the company at the Wichita terminal, * * * ."

The Wichita agency was and has been recognized as an important one and the yard switching is incidental to the many duties of the agent at this and other large and important points. Mr. Beeler testified (R. 44):

"Q. You drew your pay as Agent-Yardmaster?
A. Yes, sir.
Q. For many years, from 1938 until June 1946?
A. Yes, sir.
Q. You knew all of the time that was the title and that you were being paid for that service?
A. Yes, sir."

Mr. Beeler was under no illusion as to the correct nature of his employment and that the compensation he drew from his employer was that of Agent-Yardmaster and not as Yardmaster. When he accepted and filled the position, it has been shown that he was aware of the fact that his employer would not grant additional pay for use of his automobile or for overtime.

Respondents believe the decision of the lower court is not in conflict with the decision of any other circuit court or of this court; nor has it departed or sanctioned a departure from the accepted and usual course of judicial proceedings, nor does it call for an exercise of this court's power of supervision.

Case 420—The Decision of the Circuit Court in This Case, as in Case 419, is not in Conflict With the Decision of Any Other Circuit Court of Appeals or of This Court; Nor Has it Departed or Sanctioned a Departure From the Accepted And Usual Course of Judicial Proceedings; Nor Does it Call for an Exercise of This Court's Power of Supervision. The Railway Company Incurred no Obligation to Petitioner by Discontinuing the Yardmaster Position.

At pages 4 and 5 of the Petition a "Summary of the Matters Involved" is set forth, and at page 6 the reasons assigned for review by this court are stated. The Yardmaster labor agreements with the Railway Company are set out in the record. That of the year 1935 is shown at page 74; the 1938 agreement at page 81; the 1944 agreement at page 76 Respondents believe and have insisted at all times that after January 1, 1938, petitioner's relationship with the respondents was not subject to any of those or other labor agreements. This for the reason that he was not an employee within the designation of the Railway Labor Act, 45 USCA, Section 151 Fifth, defining the term "employee" as "one who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission * * *." *He was an official.* (*Ex Parte* No. 72 (b) and (c)) *infra,* pp. 21-22. The comprehensive order of the Commission which was referred to by the Circuit Court of Appeals in its opinion, begins at page 115 of the record. The quoted part of *Ex Parte* No. 72 appears as a footnote to the opinion at page 121 of the record.

The purposes of the Railway Labor Act, Chap. 8, Sec. 151 (a), 45 USCA, were the avoidance of interruption to commerce or to the operation of any carrier engaged therein; to forbid any limitation from freedom of association among employees or interference with the right of employees to join a labor organization; the complete independence of carriers and employees in the matter of self-organization to carry out the purposes of the Act; to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, and working conditions; and for the orderly settlement of disputes or grievances growing out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

The various agreements entered into between this employer and its employees observed the provision of the Act, and all negotiations between the parties were conducted through the recognized representatives of the parties. Section 152, Second of the Act provides:

> "All disputes between a carrier or carriers and its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute."

The Act contains other provisions with which we are not concerned, but the matter of notices given each to the other by their representatives was likewise followed in all respects.

Wichita is an important city on respondents' railroad, but it is not a division point where trains are made up or broken up in the yards. The terminal points, north and south respectively, of Wichita are Herington and Caldwell. It is necessary to have an understanding of Mr. Beeler's duties generally after January 1, 1938, when he became Agent-Yardmaster, particularly as to the length of time given to his work. Mr. Beeler stated (R. 92-93), "January 1, 1938 I was assigned the Agent's duties in addition to the Yardmaster's duties, with the title of 'Agent-Yardmaster', and have been handling both positions since, working twelve hours per day, *applying equal time of each position.*" (Italics ours.) (R. 26) Mr. Beeler stated in respect to the time he spent as Agent, "I don't think the Agent's duties altogether would amount to more than an hour a day." Again, (R. 40-41-42):

> "Q. How much time each day on the job did you spend around the station; around the freight house?
>
> A. I spent the majority of my time except when I was on the road from one place to another.

Q. Around the freight office?
A. Yes, in my office.
Q. And you had an office adjacent to the larger place or office in which the Clerks were working?
A. Yes, sir.
Q. You had general supervision over the entire business; freight business of the Rock Island Railway at Wichita, did you not?
A. Yes, sir.
Q. You were charged with the responsibilities of that office?
A. That's right.
Q. In the freight yard, generally you had one engine at work, did you not?
A. Yes, sir.
Q. Of how many men does an engine crew consist?
A. Five.
Q. An Engineer, Fireman, Engine Foreman, and two Switchmen?
A. Yes, sir."

From the foregoing we find petitioner reporting to his union representative that he divides his time equally between the yard and the freight office. Next he says his freight office duties required about one hour a day. Then next he testified that he spent the majority of his time around the freight office, the exception being when he was on the road, going from one place to another. These inconsistencies of petitioner seem very well to confirm the wisdom of making a change in the person of supervising officer.

Petitioner also testified (R. 33-34) that Mr. McGraw succeeded him as Agent-Yardmaster, and that the job was not bulletined under collective bargaining; that McGraw had no seniority as Yardmaster and that he was employed as Agent-Yardmaster. This fact is most significant. If the Yardmasters' Organization had deemed the position of Agent-Yardmaster anything less than an official position, the organiza-

tion would have protested against Mr. McGraw assuming the agency by appointment. This was not done for the patent reason that there was an agreement in effect negotiated between the employer and the employee's representative that the position of Agent-Yardmaster should be an official position not governed by any labor agreement. Plaintiff's (Petitioner) Exhibit 3 (R. 81) of January 1, 1938, Article 1, under the title "Scope," recites:

> "This agreement shall apply to positions of Yardmasters at points where such positions are established by the management and so long as such positions are maintained, the *management retaining the right to establish and abolish such positions at any point.* This agreement will not apply to positions of General Yardmasters or Footboard Yardmasters." (Emphasis added.)

Article 3 (b) (R. 82) of the same agreement provided that Yardmasters promoted to official positions or granted leave of absence in connection with committee work, "* * * will retain and accumulate seniority under this agreement."

The last named provision is carried into the agreement of May 20, 1944. That agreement also contains this paragraph under Article 1 (R. 77):

> "The practice of station agents supervising switching service at various points will not be changed or considered as affected by this agreement, but the practice will not be extended to points where yardmasters are now assigned for the purpose of displacing yardmasters."

This is a clear recognition of the regularity and propriety of *station agents* supervising switching service. Wichita was one of those points. The Yardmaster's job at Wichita was officially abolished February 3, 1939 (R. 63). Also (R. 94) in correspondence between F. H. Frye and W. F. Mielke, employer and employee representatives, (February 3, 1939) it was agreed:

"The position of Agent-Yardmaster at Wichita will be considered an official position, not covered by any working agreement."

Progressive Steps have been taken by Congress in respect to railroad labor relations. One of the earliest was Transportation Act, 1920, 41 Stat. L. 456.

Title III, Section 300, of the Act relates to "disputes between carriers and their employees and subordinate officials." Much of the original Act has been amended or repealed. The Act is an amendment of the Interstate Commerce Act approved February 4, 1887. The Interstate Commerce Commission is referred to in the labor section of the Act, 1920, as "Commission." The term "carrier" includes "any carrier by railroad, subject to the Interstate Commerce Act." Paragraph 5 of Section 300 of the Act provides:

> "The term 'subordinate official' includes officials of carriers of such class or rank as the Commission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations."

Under the general powers conferred upon the Commission by the Transportation Act, 1920, the Commission entered an order in "*Ex Parte* No. 72," in which it first quotes Paragraph 5 of Section 300 of the Transportation Act as above. In that order dated November 24, 1920, after defining certain classes of employees, not including station agents, the Commission concluded the order with this declaration:

> "The above definitions include all of the classes of employees whose claims to recognition as 'subordinate officials' were presented at the hearings, except supervisory station agents. The supervisory station agents

are those who have supervision of the work of other station employees. They cover the range from the station where one employee other than the agent is employed to the agents at the largest and most important points. They are the official and responsible representatives of the company in its relationships with the public and frequently in a legal sense. Their compensation naturally varies with the responsibilities of their positions. It is not believed that this class can be consistently included within the term 'subordinate official' as that term is used in Title III of the Transportation Act, 1920.

"The list of subordinate officials above prescribed may be enlarged or restricted after due notice and hearing, if and when occasion warrants."

At a session of the Interstate Commerce Commission on February 5, 1924, *Ex Parte* No. 72 was again under discussion and it was ordered by the Commission that the term "subordinate official" appearing in Paragraph 5 of Section 300 of the 1920 Act as quoted above, should be modified and the Commission accordingly amplified the term "Supervisory Station Agents" through the adoption of the following definition and designation:

"*SUPERVISORY STATION AGENTS.* The duties and responsibilities of supervisory station agents vary so widely that they cannot all be consistently designated subordinate officials. This class will be subdivided, therefore, as follows:

"(a) ROUTINE DUTIES. Supervisory station agents who, in addition to their supervisory duties, are required to perform work usually performed by telegraphers, telephone operators, ticket sellers, bookkeepers, towermen, levermen, or similar routine duties are employees and, although they may have supervision over one or more other station employees, cannot be properly designated subordinate officials.

"(b) SUPERVISORY DUTIES. Except those referred to in the next succeeding paragraph, supervisory station agents whose duties are wholly supervisory and who are not required to perform routine office work, as outlined in the preceding paragraph, are designated as subordinate officials.

"(c) GREATER RESPONSIBILITIES. Supervisory station agents at large and important stations whose duties are wholly supervisory, and who are of necessity vested with greater responsibilities, duties and authority than agents hereinbefore classed as subordinate officials, may be designated officials and excluded from the class of subordinate officials."

The Commission has consistently followed this designation whenever it has had occasion to consider the relationship of Supervisory Station Agents. *Ex Parte* No. 72 (Sub.-No. 1), 264 ICC 239-246.

The Railroad Labor Act of 1926, and as amended in 1934, 1936, and 1940, 45 USCA, Section 151 "First," defines the term "carrier" as including express companies, sleeping car companies, carrier by railroad, etc. Paragraph Fifth defines the term "employee" as used herein and "includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendering of his service) *who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by order hereafter entered by the Commission* pursuant to the authority which is expressly conferred upon it to enter orders amending or interpreting such existing orders." Paragraph Sixth states, "The term 'representative' means any person or persons, labor union, organization, or corporation designated either by the carrier or group of carriers, or by its or their employees, to act for it or them." (Emphasis ours.)

Under the ICC classification of (b) and (c), the status of the Wichita agent *was that of an official.* This is shown by the testimony of G. E. Mallery, Manager Personnel for the Railway Company with office in Chicago, who testified as a witness in these cases as follows:

(R. pp. 55-58.) His entire testimony is important to a more complete understanding of the cases.

Respecting the official capacity of Agent-Yardmaster, the Court inquired of Mr. Mallery:

> The Court: The agreement made with Mr. Mielke was that agreement in writing? (R. 58.)
>
> The Witness: Yes, sir.
>
> The Court: Where is it?
>
> The Witness: It was introduced this morning as defendants Exhibit B. (R. 58.)
>
> The Court: I want to read it right now. This says: "As per our agreement the position of agent-yardmaster at Wichita will be considered an official position, not covered by any working agreement, but should a yardmaster position be re-created at Wichita Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point." This also says: "Under the circumstances we are agreeable to carrying Mr. Beeler on the Wichita yardmasters' seniority list as a yardmaster, but it is very likely that the switchmen's union will contend that he will thereby lose his rights as a switchman at Caldwell. However, that feature can be met when and if the point is raised." All right.
>
> The Witness: Under that agreement, Mr. Beeler's position was Agent-Yardmaster and was not subject to any labor agreement, and as any other official position the Carrier has always maintained the prerogative to appoint them to a position and take them off of a position as they saw fit. (58)

Witness Mallery also stated that under new agreement effective March 15, 1947, it was recognized that the term "Agent-Yardmaster" was a misnomer and is continued in the new agreement, but Agents will have charge of switching yard service under the title of Agent. If in the future a Yardmaster's position would be bulletined, then the person holding seniority would become Yardmaster.

Exhibit B as read by the court and taken in the record was a letter written to Mr. W. F. Mielke. Appellant testified (R. 40) that Mr. Mielke was President or General Chairman of the Yardmasters, and Mr. Mallery (R. 69) testified that Mr. Mielke was succeeded as General Chairman of the Yardmasters by Mr. Cowick, who was General Chairman when Mr. Beeler was dismissed as Agent in June, 1946. Testifying further with reference to the relationship of Agent-Yardmaster, Mr. Mallery (Tr. 70) said:

> "*Ex Parte* No. 72 in February, 1921, following the Transportation Act of 1920, described the meaning of the term employee and subordinate officials. The Interstate Commerce Commission held hearings under *Ex Parte* No. 72 setting forth different classifications of agent. The regular agents were covered by contract. The agents at important stations, where they still were not in charge of large, important stations, where they had certain detailed work to do, they were (162) subordinate officials, and they are entitled to representation. At the larger and more important stations, they were designated and classed as supervisory officers not subject to the provisions of any contract.
>
> Q. The supervisory officers referred to in the 1944 agreement, on your theory, fall in that class of officers.
>
> A. Yes, sir; anbody not designated in *Ex Parte* 72 as an employee or subordinate official, automatically fell into the classification of an official. In other words, the Interstate Commerce Commission didn't designate who was an officer but did say who were employees and subordinate offiicals."

It was the custom and practice for the railway on one hand and the labor organizations on the other to negotiate through designated and authorized representatives. Mr. Mallery was the representative of the Railway Company. Mr. Mielke and following him Mr. Cowick were the duly-elected and authorized representatives of the Yardmasters Association of America. It was the purpose and design of all federal labor legislation that labor should speak and act through a duly-appointed or elected representative and that the carriers should likewise speak through authorized representatives.

Petitioner recognized the propriety of dealing through the representative of the Yardmasters Organization in his letter of January 16, 1939, to Mr. W. F. Mielke, its president, at Rock Island, Illinois (Exhibit A, R. 92-93-94). The subject of his letter was a complaint that his Yardmaster seniority was carried on the roster as at Caldwell instead of Wichita. Mr. Mielke, representing the Yardmasters Organization, and Mr. F. H. Frye, representing the Railway Company, conferred on January 27th, when Mr. Beeler's letter of January 16th was evidently handed to Mr. Frye, as he (Mr. Frye) wrote Mr. Mielke, February 3, 1939, returning the Beeler letter (Exhibit B, Tr. 94-95) and confirmed an agreement reached between them that Mr. Beeler be carried on the Wichita yardmaster seniority roster, and both parties recognized the Agent-Yardmaster position at Wichita to be an official position not covered by any labor contract. The letter follows:

"Mr. W. F. Mielke,
510, 39th Street,
Rock Island, Ill.
Dear Sir:

In connection with our conference on January 27, and returning Mr. Beeler's letter of Jan. 16, file 385-A.

Under the circumstances we are agreeable to carrying Mr. Beeler on the Wichita yardmasters' seniority (191) list as a yardmaster, but it is very likely that the switchmen's union will contend that he will thereby lose his rights as a switchman at Caldwell. However, that feature can be met when and if the point is raised.

As per our agreement the position of agent-yardmaster at Wichita will be considered an official position, not covered by any working agreement, but should a yardmaster position be re-created at Wichita Mr. Beeler would be entitled to consideration for same on basis of his seniority as a yardmaster at that point.

Yours truly,
F. H. FRYE

P.S. Please send carbon of this letter, approved, and return for our file.

Accepted: W. F. MIELKE."

After the dismissal of appellant as Agent-Yardmaster on June 17, 1946, Mr. Beeler wrote Mr. W. H. Hillis (Exhibit G, Tr. 106) concerning his situation and Mr. Hillis, Chief Operating Officer under the Trustees, advised him:

"The Agency at Wichita is a supervisory one, not subject to the provisions of any labor agreement.

"I am advised by our operating people in the field that they did not feel you were giving your organization the proper supervision and they therefore felt (262) warranted in removing from the position. You were not dismissed from service and you were told you could exercise such seniority rights as you may hold under any labor agreement.

"My investigation does not develop any reason for reversing the decision of our people in the field."

Petitioner's brief copies extensively from *Elgin Joliet & Eastern Ry. Co. v. Burley*, 327 U. S. 661, 66 S. Ct. 721, which involved the question of the final effect of the Railway Adjustment Board under the Railway Labor Act. A

controversy arose on the operation of the Railway Company's Whiting yard, where some of the switching crews had been employed by the Standard Oil Company to do private intra-plant switching. The intra-brotherhood clash then ensued. We believe there is no point of similarity in fact or principle as compared with Mr. Beeler's status.

Mr. Beeler as Agent, with his duties in his office at the station where he spent the majority of his time, as he testified (R. 41) included such supervision of the yard as it required. The yard engine, as abundantly shown by the evidence, capably handled the yard work receiving usual aid from train crew conductors, yard clerks, telegraph operators, etc.

Under the classification of sub (c) as above quoted from the order of the Commission in *Ex Parte* 72, dated February 5, 1924, Mr. Beeler was the Station Agent at a large and important station and his duties were wholly supervisory and were vested with greater responsibilities. He, therefore, as such Agent was designated as an official. His Yardmaster's organization (R. 94, Exhibit B) specifically recognized his agency as an official position, not covered by any working agreement. The exhibit further provided that if the position of Yardmaster should be recreated, Mr. Beeler would be entitled to consideration on basis of his seniority as a Yardmaster at that point.

The plain fact is the Yardmaster job was officially abolished February 3, 1939, by the agreement (Exhibit B) and it was so recognized by appellant and appellees at all subseqeunt times. (Petitioner and Respondents here.)

The second decision of the court, *E. J. & E. Ry. v. Burley, supra,* states in the first syllabus:

> "The extent of authority of collective agent to represent employee before Railroad Adjustment Board does not turn on technical agency rules, but may be affected

by custom and practice in the railroad world. Railway Labor Act, Sec. 3, subd. 1 (i), 45 U. S. C. A. Sec. 153, subd. 1 (i)."

Certainly the railroad world in its relationship with its employees deals with employee representatives.

Certain agreements between labor unions and the appellees are mentioned, and portions are copied, but none relate directly or by implication to the employment or discharge of an individual employee, or grant to such employee or guarantee to any employee continued employment, or deprive the employer of the right to dismiss or discharge at the will of the employer.

Courts recognize the right of a railway company to handle and manage its own affairs and to engage and discharge persons in and from its employ without creating obligations therefor, unless some express contract of hire exists.

In *Edwards v. Kentucky Utilities Co.*, 286 Ky. 341, 150 S. W. (2d) 916, the court, discussing the question of employment contracts, said:

> "A universally recognized rule of law is that a contract for permanent employment which is not supported by any consideration other than the obligation of services to be performed on the one hand and wages to be paid on the other is a contract for an indefinite period, and, as such, is terminable at the will of either party. R. C. L., Vol. 18, pp. 509, 510; Corpus Juris, Vol. 39, p. 72; *Clay v. Louisville & Nashville R. R. Co.*, 254 Ky. 271, 71 S. W. 2d 617; *Louisville & Nashville R. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467; *Perry v. Wheeler*, 12 Bush 541." (P. 918.)

In that case Edwards brought suit for breach of contract for permanent and continuous employment. The trial court dismissed the petition and on appeal to the court of appeals

the court affirmed the decision and declared in its opinion the principle so very clearly stated. That rule is so firmly grounded and established by the courts almost universally that it is written in the text of the law of "Master and Servant," 35 Am. Jur., 456. Quoting from p. 457, it is said:

> "According to the general rule as laid down by a majority of the courts, however, contracts of employment which mention no period of duration, which are in a true sense indefinite and without stipulation for an implied minimum period, are deemed terminable at will of either party; and the burden of proving the contrary must be assumed by the party who asserts that the employee is engaged for a definite period." (PP. 457-458.)

Railroad employment, so far as the individual is concerned, does not differ from employment of any other branch of industry. The United States Supreme Court, applying the terms of the Railway Labor Act to a situation presented by a dispute between the railway company and a labor organization, and the right of the railway to employ and discharge its employees, said in *Virginian Railway Co. v. System Federation No.* 40, 300 U. S. 515, 57 S. Ct. 592:

> "The provisions of the Railway Labor Act invoked here neither compel the employer to enter into any agreement, nor preclude it from entering into any contract with individual employees. They do not 'interfere with the normal exercise of the right of the carrier to select its employees or to discharge them.' See the Railway Clerks Case, *supra*, 281 U. S. 548, 571, 50 S. Ct. 427, 434, 74 L. Ed. 1034." (P. 605.)

Also, the Supreme Court said in *National Labor Relations Board v. Jones & Laughlin Steel Corp.*, 301 U. S. 1, 57 S. Ct. 615, p. 628:

> "The act does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them."

The same principle is stated in *Louisville & Nashville R. Co. v. Bryant, et al, etc.*, 263 Ky. 578, 92 S. W. (2d) 749. At p. 752 of the reporter it is stated:

> "It is a familiar rule, where a contract of hiring does not bind the employee to serve the employer for a definite fixed period, the employer may terminate the contract at any time, though he agreed to give the employee work as long as he did honest and faithful work. *Louisville & N. R. Co. v. Offutt*, 99 Ky. 427, 36 S. W. 181, 18 Ky. Law Rep. 303, 59 Am. St. Rep. 467. So is a contract for a stated position or 'as long as he performs his duties in a successful or satisfactory manner.' *Bridgeford & Co. v. Meagher*, 144 Ky. 479, 139 S. W. 750. A contract of hiring not for a definite term or period, but as long as the employee desires the position, is terminable at will of either employee or employer." (P. 752.) Cases cited.

Petitioner did not declare upon any contract of employment as such but has pleaded schedules or agreements between The Chicago, Rock Island and Pacific Railway Company with the Railroad Yardmasters of America, which is not a contract of employment in any sense but is a schedule of hours of service, working conditions, and rates of pay. He could have at any time quit the service of the employer without incurring any financial obligation whatsoever.

Further, on the nature of labor contracts, we refer to *Littell v. Evening Star Newspaper Co.*, 120 Fed. (2d) 36. Mary C. Littell brought suit against the newspaper company doing business as the Evening Star for breach of employment contract. Judgment was entered on a directed verdict for defendant and plaintiff appealed and the judg-

ment was affirmed. The fifth syllabus of the opinion very well states the substance of the opinion, and this is quoted:

> "Where the intent to enter into a contract for permanent employment, not terminable except pursuant to its express terms, is not clearly expressed, and there is no evidence showing other consideration than a promise to render services, the assumption will be that, even though the parties speak in terms of permanent employment, the parties have in mind merely the ordinary business contract for a continuing employment, terminable at the will of either party."

Alabama Mills, Inc. v. Smith (*Ala.*), 186 So. 699, is an action for breach of contract of employment. There was judgment for plaintiff, which was reversed and remanded on appeal. The first question discussed was whether plaintiff had such a contract as to justify the claim for permanent employment or employment for a definite period. At page 702 the court stated:

> "Undoubtedly a contract of employment which is in a true sense indefinite and without stipulation for an implied minimum period, is at the will of either party. 18 R. C. L. 508, section 19, and page 509, section 20; *Howard v. East Tennessee, V. & G. R. Co.*, 91 Ala. 268, 8 So. 868; *Arentz v. Morse Dry Dock & Repair Co.*, 249 N. Y. 439, 164 N. E. 342, 62 A. L. R. 231." (P. 702.)

Yazoo and Mississippi Valley R. Co. v. Webb, C.C.A. (5th Cir.), 64 Fed. (2d) 902. There was judgment for plaintiff, and on appeal to the Circuit Court it was reversed with directions to dismiss the bill. The court commented favorably upon agreements covering wages and working conditions between the managers of an industry and its employees, and said further:

> "When the agreement is published by the managers, it becomes until abrogated the rule of that industry

> and any individual who thereafter continues in its employment or takes new employment takes it on the terms thereby fixed. Ordinarily, as in this case, there is no period fixed for the hirings and they are at the will of the parties, the employer having the right to discharge at any time and the employee having the right to quit." (PP. 903-904.)

T. & N. O. R. Co. v. Brotherhood of Railway and Steamship Clerks, 281 U. S. 548; 50 S. Ct. 427 and 434 (571) Official Ed., "The Railway Labor Act of 1926 does not interfere with the normal exercise of the right of the carrier to select its employees or to discharge them." The statute is not aimed at this right of the employers but at the interference with the right of employees to have representatives of their own choosing.

Boatright v. Steinite Radio Corp. et al, 46 Fed. (2d) 385 (10th Cir.), involved a contract of employment which provided for the payment of fixed sums without providing for time which service shall continue, held to be terminable at will. At page 389 (2nd column), it is stated:

> "An agreement of employment, indefinite as to time, is terminable at the will of either party, and therefore creates no executory obligation." (Citing numerous cases.)

Also, at page 390, first column, the court stated:

> "A contract of employment, which provides that the employee shall receive a fixed sum for each day, week, month or year of service but makes no provision as to the time such services shall continue is an indefinite hiring and is terminable at the will of either party."

Kunz v. Colnon, et al, 54 Fed. Supp. 673, and two companion cases, opinion by Judge Helvering, March 31, 1944, follows the principle declared in the foregoing cases and

quoted from Swart v. Huston, 154 Kan. 182; 117 Pac. (2d) 576:

> "But a collective bargain between an employer of labor and a labor union does not ordinarily constitute a contract of employment between the employer and any individual member of that union. He and his employer make their own contract impliedly at least if not expressly. The collective bargain between employer and union outlines the general conditions under which the business shall be conducted in respect to wages, hours of labor, working conditions, and matters incidental there. Ordinarily the collective bargain does not of itself make a contract of employment between A as employer and B as workman which either can enforce, or which will furnish the basis for an action for damages if it is breached. This is settled text-book doctrine."

The court concluded as a matter of law that the plaintiffs failed to establish a right to recover and rendered judgment for the defendants against the plaintiffs for costs.

The Law Does not Require the Maintenance or Re-Establishment of a Yardmaster for the Sole Benefit of Petitioner.

We believe the foregoing principle is well established. In *Great Northern Ry. Co. v. State of Minnesota, ex rel.*, 238 U. S. 340, 35 S. Ct. 753, the court said:

> "A railroad's possessions are subject to its public duty; but beyond this and within charter limitation, like other owners of private property it may control its own affairs." (P. 755.)

In *Brooks-Scanlon Co. v. Railroad Commission of Louisana*, 251 U. S. 396, 40 S. Ct. 183, it is said:

> "A carrier cannot be compelled to carry on even a branch of business at a loss, much less the whole business of carriage." (P. 184.) (Citing cases.)

The case of *Yazoo & Mississippi Valley R. Co. v. Mitchell,* 173 Miss. 594, 161 Sou. 860, was decided by the Supreme Court of Mississippi. Because of changed operating conditions due to the construction of a bridge across the Mississippi River at Vicksburg and to effect great economies in operation, the switching yards of that railroad with the Alabama & Vicksburg Ry. Co. were consolidated, resulting in the revision of the seniority lists and the displacement and loss of employment by Mitchell, who claimed his seniority rights had not been observed. He brought suit against his employer and obtained judgment in a Circuit Court. On appeal the Supreme Court reversed the judgment and in the course of its opinion said: (P. 863)

> "The railroad had a right to merge its two yards in the interest of economy. The railroad, in fact, had a right to abolish any switching yard. There was no effort in either of the contracts to prevent merger, consolidation, or abolishment of any such yard."

Crowley v. Delaware & Hudson R. Corp., 63 Fed. Supp. 164. Plaintiff was a Train Dispatcher. The railroad made some rearrangement in the dispatching of its trains, whereby the position of Night Chief was abolished, and in accordance with an arrangement respecting seniority rights the plaintiff bid in the first Trick Dispatcher tour of duty. The change from Chief Dispatcher to Trick Dispatcher brought about a reduction in his pay. An award was made in his favor by the National Railroad Adjustment Board and the suit was brought by plaintiff to enforce the award. The court denied recovery and said: (P. 166)

> "There is no obligation on the defendant to create or re-establish any particular position. Plaintiff's legal rights are invaded only when he fails to receive the payroll classification to which he is entitled by reason of duties performed. The contention that the duties of

night chief dispatcher still exist at Carbondale and are being performed by employees other than the plaintiff is not available here. To sustain such a contention would require that there be read into the agreement a provision to the effect that whenever the duties of a position exist then a corresponding payroll classification must be designated. The agreement contains no such provision."

The court further held that necessity for the position of Night Chief Dispatcher was not at issue, although the Adjustment Board seems to have reached its conclusion upon that assumption.

Another Train Dispatcher case is that of *Hanks v. Delaware & Hudson R. Corp.*, 63 Fed. Supp. 161. The Hanks case was decided by Judge Brennan, as was the case of *Crowley v. Delaware & H. R. Corp.*, just above mentioned. The controversy between Hanks and the Railroad was submitted to the National Railroad Adjustment Board, which found the issues in favor of Hanks. The Board found in that case that all supervisory work formerly performed by the Night Chief had been transferred to the Chief Dispatcher. Hanks contended that the duties of Night Chief still exist at the Plattsburg office and that he actually performs such duties on his tour as Trick Train Dispatcher. There was no question of supervision or of the official capacity of plaintiff Hanks. The court held that the Adjustment Board having found favorably to Hanks, it would not disturb the order.

In the Crowley case, supra, the court held there was no obligation on the part of the defendant to create or reestablish any particular position, but the court states the difference in the two cases in its conclusion, to-wit:

"Necessity for the position of Night Chief Dispatcher is not an issue here, as it was in the Hanks case, although the Board seems to have reached its conclusion

upon that assumption, ignoring the essential difference between the two cases.

"The defendant is entitled to a judgment dismissing the complaint." (P. 167.)

In the present case, in the interest of economy the Yardmaster's position was abolished and there was no subsequent need for it, and surely the railroad could not be required to re-establish it for the sole purpose of giving Mr. Beeler a job. The court stated in the Hanks case, *supra*:

> "Neither management nor labor, both charged with obligation of the successful operation of a business, can afford to maintain a useless position therein." (P. 163.)

The Findings of Fact are Fully Supported by the Evidence. The Law is Correctly Stated by the Court and Should be Sustained.

Rule 52 (a) as amended states:

> "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the Trial Court to judge the credibility of the witnesses."

Appellees submit there has been no showing that the Findings of Fact are erroneous in any respect.

With respect to Findings of Fact, it was held in *Alabama Power Co. v. Ickes*, 302 U. S. 464, 58 S. Ct. 300, page 303, that:

> "These findings were made, after hearing, by the district judge upon undisputed or conflicting evidence. The findings were not questioned by the court below; and since they are not without substantial support in the evidence, we accept them here as unassailable. *Davis v. Schwartz*, 155 U. S. 631, 636, 637, 15 S. Ct. 237, 39 L. Ed. 289, *Adamson v. Gilliland*, 242 U. S. 350, 353, 37 S. Ct. 169, 61 L. Ed. 356."

Since the correctness of the findings has not been attacked, it must be assumed at least that they are correct and should not be set aside.

U. S. v. Aluminum Company of America, 148 Fed. 2d 416, the court said at p. 433:

> "Since an appellate court must have some affirmative reason to reverse anything done below, to reverse a finding it must appear from what the record does preserve that the witnesses could not have been speaking the truth, no matter how transparently reliable and honest they could have appeared. Even upon an issue on which there is conflicting direct testimony, appellate courts ought to be chary before going so far; and upon an issue like the witness's own intent, as to which he alone can testify, the finding is indeed 'unassailable,' except in the most exceptional cases."

And again at p. 434, the court said:

> "Upon this, as upon all the issues, the plaintiff had the burden and must lose unless it succeeded in doing more than leaving the proof in balance. Taking all these considerations together, it seems plain to us that we should be unwarranted in declaring these findings 'clearly erroneous'."

In this case and in his first cause of action thereof, Mr. Beeler predicated his right to recover in that certain named officials prevented this plaintiff from exercising his seniority rights and his reinstatement in his duly assigned job as Yardmaster at Wichita, and that their wrongful acts were the sole and proximate cause of the damages and loss of salary of plaintiff to date and until such time as he is reinstated and duly assigned his job as Yardmaster at Wichita, Kansas. In his second cause of action in the same case, Mr. Beeler demands judgment against the defendants and each of them for damages and loss of salary for the period of his life ex-

pectancy from June 14, 1946, 11.10 years. Plaintiff Beeler proceeds upon the theory that there was a Yardmaster job available to him in the Wichita yard. As has been shown above herein, that position or job was definitely abolished in January, 1939, and its abolition was in strict accord with the powers reserved by the employer and concurred in by the Yardmasters' Organization in the various contracts to which reference has been made, of July 30, 1935, January 1, 1938, and May 20, 1944. All of these recognize the unrestricted right of the employer to abolish Yardmaster positions. The agreements further preserve to Yardmasters their seniorities wherever such seniority may have accrued. In Mr. Beeler's case his seniority entitled him to a place as Switchman at Caldwell. Thus he was not thrown out of employemnt but had the right to avail himself of that place with its accompanying remuneration."

Respondents rely heavily on *Elgin, J. & E. Ry. Co. v. Burley,* in which there were two decisions of this court under the same title, namely, 325 U. S. 408, 65 S. Ct. 1282; and 327 U. S. 661, 66 S. Ct. 721. The facts involved are stated by Mr. Justice Rutledge in the first case at page 712. He stated:

> "The cause brings for decision novel and important questions concerning the authority of a collective bargaining representative, affecting the operation of the Railway Labor Act of 1934. * * * The ultimate issues are whether such an agent has authority, by virtue of the Act or otherwise, either to compromise and settle accrued monetary claims of ten employees or to submit them for determination by the National Railroad Adjustment Board, to the exclusion of their rights, after the settlement and after the Board's adverse decision, to assert them in a suit brought for that purpose."

The claims are for "penalty damage" for alleged violation of the starting time provisions of a collective agreement.

In the second opinion at page 663, referring to the previous decision, the Court said:

> "That opinion expressly refrained from undertaking to make a definitive statement of what might be sufficient evidence of the collective agent's authority either to settle finally the aggrieved individual employee's claims or to represent him exclusively before the Adjustment Board. We do not attempt to do so now. For whether the collective agent has such authority is a question which may arise in many types of situations involving the grievances either of members of the union or of non-members or both, and necessarily, therefore, no all-inclusive rule can be formulated for all such situations."

The facts in the present case differ in their entirety from those outlined in the cases of *E. J. & E. Ry. Co. v. Burley.*

In the present case we find a Yardmaster job abolished and such duties as may have attached thereto, wholly supervisory in their nature, were transferred and added to those of the Agent, who occupied an official position not subject to any labor agreement. Mr. Fowler served in that position 8½ years without complaint to anyone and without controversy of any nature whatsoever. His situation comes well within the principles of law as declared in the decisions referred to herein, though the facts may be different from those here involved. The decision of the Circuit Court of Appeals reviewed the various agreements to which reference has been made, and having reviewed the record and the assignment of errors, reached the conclusion that the Station Agency at Wichita, a large and important city, was not covered by or included within any labor agreement. No notice to the Yardmaster by the employer was necessary in the decision of the master to establish or abolish such position at any point on the railway system. This is in accord with the practice and fully justified by *Ex Parte* No. 72 (c).

For convenience and clarity respondents separated the foregoing cases insofar as seemed consistent with the requirements thereof, but respectfully request that the law as presented be applied to each as it may be in point or controlling.

Respondents believe the decision of the lower court conforms with the decision of other circuit courts and of this court, as indicated by the decisions to which reference has been made. The proceedings in the trial court and on appeal in the Circuit Court accord with the accepted and usual course of judicial proceedings. Respondents submit that these cases do not call for an exercise of this court's power of supervision.

IT IS RESPECTFULLY SUBMITTED THAT THE PETITION FOR WRIT OF CERTIORARI IN EACH FOREGOING CASE SHOULD BE DENIED.

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